



DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

MEMORANDUM

DATE: August 16, 1999

TO: Richard Bailey, Adjudicator
Water Resources Department

FROM: Walter Perry, Assistant Attorney General
Natural Resources Section

Meg Reeves, Assistant Attorney General
Natural Resources Section

SUBJECT: Bureau of Reclamation Project claims

Question: You have asked whether the Bureau of Reclamation (BOR) claim for the Klamath Project is subject to the common law principles of beneficial use.

Answer: Yes. The BOR is entitled to the amount of water that is necessary to develop the project that was described by the BOR in its notice and plans, and that was put to beneficial use within a reasonable period of time.

We emphasize that our advice is preliminary, and may change based on arguments presented by claimants and others during the course of the adjudication.

Background

On May 19, 1905, the United States filed a notice of its intention to utilize certain waters of the Klamath River. The notice stated:

“Notice is hereby given that the United States intends to utilize certain waters as follows: * * * All of the waters of the Klamath Basin in Oregon, constituting the entire drainage basins of the Klamath river and Lost river * * *.”

The notice was filed pursuant to the federal Reclamation Act of 1902. Section 8 of the Act provides :

“That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation * * * and *the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws* * * *: Provided, That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land

irrigated, and *beneficial use shall be the basis, the measure, and the limit of the right.*"

Act of June 17, 1902, ch. 1093, § 8, 32 Stat. 388, 390, (current version at 43 USC § 372 (1994)) (emphasis added).

The filing was also authorized by General Laws of Oregon 1905, Chapter 288, section 2, which provided in part that:

“Whenever the proper officers of the United States, authorized by law to construct works for the utilization of water within this State, shall file in the office of the State Engineer a written notice that the United States intends to utilize certain specified waters, the waters described in such notice * * * shall be deemed to have been appropriated by the United States; *provided*, that within a period of three years from the date of filing such notice the proper officer of the United States shall file final plans of the proposed works in the office of the State Engineer for his information; *and provided further* that within four years from the date of such notice the United States shall authorize construction of such proposed work.” * * *

Analysis

In a 1950 opinion, this office addressed the extent of the United States’ rights under the 1905 filing. *See* 25 Op Atty Gen 62 (1950). At that time, the State Engineer had received a number of requests for permits to use the water of the Klamath River. The State Engineer asked whether there was any water available for further appropriation or whether the United States was entitled to “all” the water in the basin.

The Attorney General noted that under both state and federal law, the United States’ water rights were subject to the common law principles of beneficial use. Under these principles, water use under a filing is limited by the size of the project that was intended when the filing was made and the amount of acreage that was subsequently diligently developed. The Attorney General concluded that the legislature, in enacting the 1905 statute, did not intend to abrogate these common law principles relating to water rights. The Attorney General stated:

“No contention is raised as to the right of the United States to file upon a specific amount of water that may be necessary in carrying out the project, nor is it contended that such a project should be completed within a certain period of time. **The only conditions to be imposed are an intention to apply the water beneficially and the completion of the such project within a reasonable time**, such reasonable time depending upon the size of the project and the work involved.”

25 Op Atty Gen at 64 (emphasis added).

With respect to the original intent of the United States to use the waters in the Klamath River the Attorney General stated:

“[At] the time of filing * * * there must be an intention to apply the water to beneficial use and make application thereof within a reasonable time. **The notice and map filed pursuant to [General Laws of Oregon 1905, chapter 288], mark the limit of the proposed enterprise and determine the amount of water required for such project.**”

25 Op Atty Gen at 65 (emphasis added).

The Attorney General stated that although the notice filed by the United States claimed “all” of the water, the notice must be read in the context of the plan filed by the United States:

“The use of the word ‘all’ as appears in the notice, under any reasonable construction, could only mean that water which is reasonably necessary and can be beneficially applied to the proposed project. * * * The plans mark the limit of the area upon which the water is to be used.”

Id.

The extent of development the United States completed within a reasonable period of time is a question of fact for the Department to make in its findings and order of determination. That determination is dependent, in part, on the size of the project and the scope of the work involved. With respect to that question, the Attorney General noted in 1950 that forty years had passed since the United States had made its original filing and that the State Engineer *could* find that the “reasonable period” for development of the noticed project had expired by November, 1950.

We are not aware of any court opinions since 1950 that would call into question the Attorney General’s conclusions in the 1950 opinion. Therefore we conclude that the United States is entitled to the amount of water that is necessary to develop the project described by the United States when it filed its 1905 notice and plan, and that was subsequently developed within a reasonable period of time, with a priority date of May 19, 1905.

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¹ The Klamath Project may also encompass land having appurtenant water rights with a priority date earlier than 1905, by reason of an earlier appropriation.